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Supreme Court, U.S.
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No. 97-478

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

STRUCTURAL FIBERS, INC. and
ESSEF CORPORATION,
Petitioner,

v.

JAMES KULCH,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

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STATEMENT OF PROCEEDINGS

Petitioner demonstrated that the issue of the applicability of OSHA §4(b)(4) to state employment torts is ripe for certiorari. Respondent opposes by urging 1) that this Court should dismiss the petition on procedural grounds; and 2) that, on the merits, OSHA §4(b)(4) does not "preempt" his claim. Both are ill conceived arguments.

ARGUMENT

I. PETITIONER HAS PRESERVED THE FEDERAL ISSUE FOR CERTIORARI BY PRESENTING THE FEDERAL QUESTION IN CONFORMANCE WITH STATE PROCEDURE.

Presentation of a federal issue on a motion for rehearing to the highest court of a state is reviewable by writ of petition for writ of certiorari. There would certainly be jurisdiction had the Ohio court granted the rehearing. There should not be a different result by virtue of the fact that the Ohio Supreme Court did not grant the motion[1]. 16B Wright & Miller, FEDERAL PRACTICE & PROCEDURE,

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[1] Although this is not a preemption case, but a case that turns on another federal jurisdictional statute, Section 4(b)(4), International Longshoremen Assn. v. Davies (1986), 106 S.Ct. 1901, 1910-1913, 476 U.S. 380, 387-373, 90 L.Ed.2d 389 may be instructive. Failure to plead or argue preemption until a motion j.n.o.v. does not excuse the state court of appeals form considering it. The court held that the state procedural rules are not independent of the antecedent federal question of whether the federal law ousted state jurisdiction.

Jurisdiction and Related Matters, §4022, p. 332. This is true for two reasons. First, Appellant is presenting a federal question that arose out of an unexpected decision by the Ohio Supreme Court on the merits departing from its own precedent. Secondly, under Ohio practice, a petition for rehearing is a sufficient mechanism to raise a question of law that was not considered previously.

A federal issue may be raised in a motion for rehearing where it only became relevant when the state court overruled its prior decisions. PruneYard Shopping Center v. Robbins 100 S.Ct. 2035, 2043, 447 U.S. 7485, 64 L.Ed.2d 731 (1980) at note 9:

> "...federal claims...have been adequately presented even though not raised in lower courts when the highest state court renders and unexpected interpretation of state law or reverses its prior interpretation."

See similarly in Great Northern Railway v. Sunburst Oil & Refinery Co. 53 S.Ct. 145, 149, 287 U.S. 53, 58, 366, 77 L.Ed. 360 (1932) (constitutionality raised in motion for rehearing) and Ex rel. Missouri Insurance Company v. Gehner 50 S.Cpt. 326, 327, 281 U.S. 313, 320, 74 L.Ed. 870 (1930)(state supreme court adopted a tax apportionment method not used by the agency or considered below).

Secondly, raising federal claims in a motion for rehearing is sufficient where the state system frequently treats such petitions as sufficient. Bankers Life & Casualty Company v. Crenshaw 108 S.Ct. 1645, 1650, 486 U.S. 71, 77, 100 L.Ed.2d 62 (1988) following Hathorn v. Lovorn 102 S.Ct. 2421, 457 U.S. 255, 261-265, 72 L.Ed.2d 824 (1982).

(A) It Is Timely to Raise Federal Claims in a Motion for Rehearing in a State Supreme Court which Treats such Motions as Sufficient.

The Ohio Supreme Court Rules of Practice, Rule XI, §2 (attached as Appendix Q, p. A238) states that such a motion must be confined strictly to the grounds for rehearing and "shall not reconstitute a reargument of the case." Therefore, substantively the motion to reconsider may not present what has already been submitted previously.

Exemplary of this are the reconsiderations before the Ohio Supreme Court in the matter of the City of Rocky River v. State Employment Relations Board, 39 Ohio St.3d 196, 530 N.E.2d 1 (Ohio 1988), which was subject to four published decisions and are described below.

The Rocky River litigation was a suit for declaration of the constitutionality of the state statute requiring binding arbitration between cities and the unions representing city employees. In its initial decision, (decided November 2, 1988) the Ohio Court held that R.C. 4117.14(I) was unconstitutional. By the fourth decision [43 Ohio St.3d 1, 539 N.E.2d 103, decided May 10, 1989], R.C. 4117.14(I) was held constitutional. Between November 1988 and May 1989, two unusual developments occurred. The composition of the Ohio Supreme Court changed as a result of election. Also, two motions to reconsider had intervened, with one such motion considered by each of the two constituted panels.

The decision on the first motion to reconsider [herein Rocky River II, 40 Ohio St.3d 606, 533 N.E.2d 270 decided December 22, 1988 attached as Appendix R] was written by the then (and current) Chief Judge Moyer. The motion had urged that the court declare whether the enforcement of a grievance arbitration award under 4117.09(B)(1) was constitutional. Chief Judge Moyer stated "that issue was not

raised, was not considered, and was not decided in the majority opinion." He explained that a different statute, R.C. 4117.14(I), was declared in the former decision and that R.C. 4117.14(H) was also declared in the body of the decision although not in the syllabus. Because R.C. 4117.09(B)(1), was not raised and not argued and not decided, but had been raised in the motion for reconsideration, Chief Judge Moyer proceeded to consider the effect of the decision with respect to that statute. The court found that part of R.C. 4117.09(B)(1) was inconsistent with the prior decision and part was not. Chief Judge Moyer concluded that: "In all other respects, the motions for reconsideration and clarification are overruled as they have raised no germane arguments that were not considered by the court in the disposition of the appellant's appeal." (emphasis added) Id. at 607.

Rule IX requires that a motion for rehearing not submit a matter previously considered. The Rocky River II reconsideration is exemplary of just that. It's sole basis for granting reconsideration was a statute not considered before. The basis for not reconsidering the balance of the motion was that the rest of the motion did not submit matter that was not considered by the court earlier.

After the reconsideration in Rocky River II, the Ohio Supreme Court entertained another such motion. After the election reconstituted the panel of the Court, but ostensibly timely within the Court's rules, the litigants filed a motion to reconsider the first reconsideration[2]. The second reconsideration [herein Rocky River III, 41 Ohio St.3d 602, 535 N.E.2d 657 decided February 10, 1989, attached hereto as Appendix S] raised three discrete points (c.f. Holmes dissenting at 608). Notwithstanding the limited scope of the

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[2] Rule XI has since been changed to limit the type of decisions subject to reconsideration.

second motion, the court held "The motion for reconsideration is granted as to all issues in this cause...Case to be decided on merit briefs previously filed. No oral argument." Id. at 602.

Of particular note was the case that was cited with approval, OAMCO v. Lindley (1987), 29 Ohio St.3d 1, 503 N.E.2d 1388 (Ohio 1987). In OAMCO, a first motion on rehearing had been ruled upon but the court accepted a second motion on the appellees' contention that "the scope and effect of our ruling with regard to the prospective application of the decision is unclear..." (Id. at 2, emphasis added).

In the instant case, Petitioner's motion for reconsideration addressed the future application of OSHA §4(b)(4) to the decision on the merits which, departing from precedent, created a new cause of action directly and indirectly based on OSHA.

Indeed, the majority Rocky River III stated, "The fact is that no precedent governs the procedural matter which is before us." Id. at 604. Petitioner does not go so far as the court to say there is no standard. Petitioner has relied on the standard of Rule XI and Rocky River II. The absence of any standard should mean that granting a motion to reconsider is totally arbitrary with the court. That is, anything may be submitted to reopen the case without limitation. Certainly that is broader than need be, but if it is so, Petitioner submits it has met such a very loose standard as well.

(B) The Federal Question Arose for the First Time as an Unexpected Basis for the Decision by the Ohio Supreme Court.

In this case, the Ohio Court issued an unexpected extension of Ohio law to incorporate OSHA §11(c), 29 U.S.C. §660(c) into state public policy as a tort. Kulch v. Structural Fibers 78 Ohio St.3d 134 (Ohio 1997) Syllabus 1.

The holding both directly and indirectly uses OSHA to support a state employment tort cause of action. These steps were not argued by the parties, are contrary to Ohio precedent and were criticized by the dissent.

The Ohio court adopted a proposition of law, Kulch Syllabus 1, that was not urged by the parties. The proposition argued by the parties was whether Ohio common law provided a tort remedy for the state whistleblowers statute.[3] The Ohio Court's rules require the Appellant to submit a proposition of law that could serve as a syllabus. Ohio Supreme Court Rules of Practice, Rule VI, §1 (Appendix Q, p. A238). Respondent's Proposition of Law No. 2 did not mention OSHA but reads:

> The Ohio Whistleblowers Statute, R.C. 4113.52, does not preempt Greeley common law public policy tort claims involving whistleblowing. Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St.3d 228 (1990) applied. (Appendix F, p. A129)

See also Petitioner-Appellee's Proposition of Law No. 3, Appendix E, p. A103.

In the memoranda in support of and opposing jurisdiction in the Ohio Supreme Court, the threshold to further appeal to that body, the parties both addressed the public policy tort issue as a question of whether the whistleblower statute adopted by the General Assembly preempted the public policy tort claim by evidence of the

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[3] The remand instruction to consider whether an OSHA filing raised issues of state environmental crimes to an "appropriate authority," was too bizarre for either party to have anticipated in a proposition of law, and they did not.

remedial provisions of the statute. Appendix H, p. A145 and Appendix I, p. 160, and p. A174. Similarly the argument to the Court of Appeals, was postured in the same vein. See Appellant's Assignment of Error No. 4, Appendix L., p. A213 and Appellee's Counter-Statement to Assignment of Error No. 4 at Appendix K, p. A197.

Instead the Court held that OSHA itself was an independent source of Ohio public policy for the employment tort.(c.f. Kulch at Syllabus 1, and pp. 151, 153, 162, (A62, A73, A83) and Petition, pp. 6-12.)

Both the merit briefs to the Supreme Court made nearly identical references to OSHA §11(c). Respondent's brief did not argue the proposition of law adopted by the Ohio court. His argument with respect to OSHA §11(c) was simply that since OSHA did not provide a private remedy, a private remedy ought to be extended to the employee by virtue of the state whistleblower statute under Greeley. Appendix F, p. A125.

In the merit brief, Petitioner similarly observed OSHA §11(c) did not provide a private right of action. However, Petitioner demonstrated that the prior holding in Painter v. Graley, 70 Ohio St.3d 377, 639 N.E.2d 51 (Ohio 1994), Syllabus 3, did not include federal statutes as public policy that would support a tort cause of action. Appendix E, p. 117-119. The Painter syllabus was reaffirmed later in Collins v. Rizkana, 73 Ohio St.3d 65 (Ohio 1995). See Petition for Writ of Certiorari p. 9-10 and the Petitioner's Merit Brief, Appendix E, p. A118.

As a result of an unexpected decision that was inconsistent with prior precedent, the Petitioner's sole resort was to submit the federal issue in a petition for rehearing to demonstrate to the court a hitherto unconsidered matter that would affect the prospective application of its holding in this case. Those circumstances are clearly both, within Ohio and federal practice, a means by which an issue can be presented

to the Ohio Supreme Court and a federal issue preserved for a petition for writ of certiorari.

So unexpected and ill considered was the extension of Ohio law to incorporate the OSHAct that Justice Cook in Kulch dissenting criticized it as one of the many difficulties that the majority opinion presented. Justice Cook wrote:

> "As for reliance on the Occupational Safety and Health Act of 1970 (OSHA) Section 651 et seq., Title 29, U.S. Code, it is questionable, even as a general proposition, to look to a federal statute as a source of Ohio public policy. ... Without meaningful analysis of the relevant statute, the majority announces that OSHA creates a clear statement of public policy favoring 'work place safety' and Greeley thereby permits a cause of action for retaliatory discharge grounded in common law. Such reasoning is dubious in light of the fact that although Section 660(c), Title 29, U.S. Code provides whistleblowers a remedy for retaliatory discharge, that section does not provide whistleblowers with a private cause of action. Taylor v. Brighton Corporation (C.A.6, 1980), 616 F.2d 256. ...
>
> This court's creation of a Greeley claim based on the federal policy to promote "work place safety" permits an employee to do in Ohio courts that which OSHA forbid in federal court -- to bring a private cause of action. The majority adopts that portion of the federal public policy supporting that determination while ignoring the policy-driven balancing components of that legislation. As a consequence, we are left with an exception to

> the employment at-will doctrine purportedly grounded on federal public policy that is more transparent than it is clear. Kulch at 165, Appendix p. A87-88.

The Ohio Court unexpectedly departed from precedent and from the issues presented to it. An analysis of OSHA that the dissent desired would have focused on the OSHA §4(b)(4) issue. The motion for rehearing was the only means to preserve the issue in this circumstance.

II. RESPONDENT OFFERS NO CREDIBLE OPPOSITION TO THE GRANTING OF CERTIORARI ON THE MERITS OF THE APPLICATION OF OSHA §4(b)(4) TO THE OHIO PUBLIC POLICY EMPLOYMENT TORT.

In precis, the Respondent's merit position is that the neutrality provision OSHA §4(b)(4) only deals with physical injuries not wrongful discharges; that only federal standards have preemptive affect under Section 18(a), and that Petitioner brought his claim under Ohio common and statutory law ("entirely") that should not be "neutralized" by OSHA. Each and every of these points are inapposite. Respondent is suing for damages related to his heart condition. Appendix T, Plaintiff's cardiologist expert report on remand. The preemption by the standards is simply the wrong issue under discussion. Finally, it is OSHA that is "neutralized" by Congress in OSHA §4(b)(4).

Respondent misses the thrust of the Ohio court's decision and that of the Petition for Writ of Certiorari.

CONCLUSION

For the reasons submitted herein as well as those presented in its petition for writ of certiorari, the Petitioner prays the writ be granted.

Respectfully submitted,

/s/_____
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Dated: November 10, 1997

APPENDIX Q

Ohio Supreme Court Rules of Practice

RULE VI. BRIEFS ON THE MERITS IN APPEALS

Section 1. Appellant's Brief.

(B)(4) An argument, headed by the proposition of law that appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if appellant prevails. See Drake v. Bucher, Supt. (1966), 5 Ohio St.2d 37, at 39. If several propositions of law are presented, the argument shall be divided with each proposition set forth as a subheading.

RULE XI. ENTRY OF SUPREME COURT JUDGMENT; MOTIONS FOR RECONSIDERATION AND FOR REOPENING; ISSUANCE OF MANDATE

Section 2. Motion for Reconsideration

(A) A motion for reconsideration may be filed within 10 days after the Supreme Court's judgment entry or order is filed with the Clerk. A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, shall not constitute a reargument of the case, and may be filed only with respect to the following:

(1) The Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal;

(2) The sua sponte dismissal of a case;

(3) The granting of a motion to dismiss;

(4) A decision on the merits of a case.

(B) An amicus curiae may not file a motion for reconsideration without prior leave of the Supreme Court.

(C) The Clerk shall refuse to file a motion for reconsideration that is not expressly permitted by the rule or that is not timely.

APPENDIX R

City of Rocky River,
Appellant,

v.

State Employment Relations Board, et al.,
Appellees.

No. 87-157

Supreme Court of Ohio

Submitted Dec. 13, 1988.

Denied Dec. 22, 1988.

City filed action seeking declaration that state statute requiring binding arbitration between representative of city's safety workers and city violated State Constitution. Trial court granted motions of state employment relations board and city fire fighter's union for summary judgment. City appealed, and the Court of Appeals, Cuyahoga county, affirmed. On further appeal, the Supreme Court, 39 Ohio St.3d 196, 530 N.E.2d 1, held that statute was unconstitutional to extent that it violated city's powers of local self-government and was improper delegation of municipal legislative authority. On motion for rehearing, the Supreme

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Court, Moyer, C.J., held that decision did not render invalid portion of another statute permitting suits to enforce grievance arbitration awards.

Motions for reconsideration and clarification denied in part and granted in part.

Sweeney, Douglas and Herbert R. Brown, JJ., dissented.

LABOR RELATIONS

232A	**------**
232AI	**In General**
232Ak7	**Statutory Regulations in General**
232Ak8	**Validity of regulations.**

Ohio 1988.

State statute permitting party to agreement to bring suit for enforcement of award made by arbitrator is invalid only to extent that it permits enforcement of binding arbitration award made pursuant to unconstitutional state statute requiring binding arbitration of collective bargaining disputes between representatives of municipal employees and municipal employers. R.C. §§ 4117.01 et seq., 4117.09 (A, B), (B)(1).

[533 N.E.2d 271] Calfee, Halter & Griswold, Mark I, Wallach, William E. Coughlin, John E. Gotherman, Cleveland, and Russell A. Olson, Law Director, **Rocky River**, for appellant.

Anthony J. Celebrezze, Jr., Atty. Gen., and Joseph M. Osler, for appellee State Employment Relations Bd.

Joseph W. Diemert, Jr. & Associates Co., L.P.A.,

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Joseph W. Diemert, Jr., Mayfield Heights, and William F. Schmitz, Chardon, for appellee **Rocky River** Firefighters Assn., Local 695.

Berkman, Gordon, Murray & Palda and George W. Palda, Cleveland, for appellee AFSCME Ohio Council 8.

[1989 SERB 4-1] MOYER, Chief Judge.

Appellees have suggested in their memoranda in support of motions for rehearing and/or clarification that the majority opinion strayed from the issue presented by the appeal. They contend that the majority has declared that the enforcement of grievance arbitration awards as provided in R.C. 4117.09(B)(1) is unconstitutional. Appellees are mistaken. That issue was not raised, was not considered, and was not decided in the majority opinion. (See 39 Ohio St.3d 196, 530 N.E.2d 1.)

Because R.C. 4117.14(i) was declared unconstitutional, it was necessary to review the remainder of R.C. Chapter 4117 to determine whether other sections of the chapter needed to be declared invalid or modified in view of our narrow holding. We declared R.C. 4117.14(H) to be invalid because it gave the common pleas courts jurisdiction to review awards produced by binding arbitration that could no longer be made in view of our decision.

When we reviewed the language of R.C. 4117.09(B)(1), we observed that the last sentence in that subsection states: "A party to the agreement may bring suits for violation of agreements or
the . . ."

* * * * *

APPENDIX S

City of Rocky River,
Appellant,

v.

State Employment Relations Board, et al.,
Appellees.

No. 87-157

Supreme Court of Ohio,
Cuyahoga County.

Submitted Jan. 17, 1989.

Denied Feb. 10, 1989.

Appeal from the Court of Appeals for Cuyahoga County, No. 51299.

Calfee, Halter & Griswold, Mark I. Wallach, William E. Coughlin, John E. Gotherman, Cleveland, and Russell A. Olson, Law Director, **Rocky River**, for appellant.

Joseph w. Diemert, Jr. & Associates Co., L.P.A., Mayfield Heights, Joseph W. Diemert, Jr., Cleveland and William F. Schmitz, Chardon, for appellee **Rocky River** Firefighters Assn., Local 695.

Paul L. Cox, Columbus, and Kay E. Cremeans, Ashville, in support of motion for amicus curiae, Fraternal

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Order of Police of Ohio, Inc.

Cloppert, Portman, Sauter, Latanick & Foley, Robert W. Sauter, and Russell E. Carnahan, Columbus, in support of motion for amicus curiae, Fraternal Order of Police, Capital City Lodge No. 9.

Conway, Barclay, Deyo & Kuran Co., L.P.A., and Donald K. Barclay, Cleveland, in opposition to motion, for amicus curiae, Ohio Mun. League.

Kelley, McCann & Livingstone and Stephen M. O'Bryan, Cleveland, in opposition to motion, for amicus curiae, Ohio Mun. Attorneys Assn.

ON MOTION FOR RECONSIDERATION OF DENIAL OF MOTION FOR REHEARING.

The motion for reconsideration is granted as to all issues in this cause. See (1988), 39 Ohio St.3d 196, 530 N.E.2d 1, and (1988), 40 Ohio St.3d 606, 533 N.E.2d 270. Case to be decided on the merit brief previously filed. No oral argument.

SWEENEY, DOUGLAS, HERBERT R. BROWN and **RESNICK, JJ.**, CONCUR.

MOYER, C.J., and **HOLMES** and **WRIGHT, JJ.**, dissent.

HERBERT R. BROWN, Justice, concurring.

Ordinarily we do not write in procedural matters, and I would not in this instance, but for one dissent which lays a

false claim to the benefit of precedent, fails in a tortuous attempt to distinguish *Joseph v. Dever* (case No. 86-1688), and inaccurately states the facts of record.

First, the motion for reconsideration at issue was filed within ten days of the *final* decision in this case. The motions for rehearing filed on November 14, 1988 were granted in part. A clarification was issued on December 22, 1988. Thus the opinion of this court was not finalized until December 22, 1988. The motion before us was filed on January 3, 1989. While this may *appear* to be more than ten days after the decision, such is not the case. January 1 fell on Sunday and January 2 was a legal holiday (New Year's Day). Thus the ten-day period which would seemingly have expired on January 1 was extended (in accordance with the law) to January 3, the date the motion was filed.

Second, *Joseph v. Dever, supra*, cannot be distinguished. A denial of a motion to certify adjudicates the dispute between the parties every bit as much as a decision by this court on the merits. Our rules make no separate ***603** provision for motions to rehear decisions on motions to certify.

Such motions fall under Section 1, Rule IX, and must be filed within ten days of the [535 N.E.2d 658] decision. (FN1) Surely no one can embrace the logical result of the reasoning contained in one of the dissents--that there is no rule and no time limitation upon the reconsideration of our decisions on motions to certify. In *Joseph v. Dever, supra*, an author of one of today's dissents voted for not only a second motion to reconsider but also a *third*. Further (unlike the present case), there was no intervening decision by the court to trigger an additional period of time for the filing of the *Dever* motions.

Third, when one dissent labels the present case unprecedented, the dissent fails to recognize the court's history. This court and its predecessors have reversed decisions after the denial of a motion to rehear. Such was the case in *Wisniewski v. Wisniewski* (1985), 20 Ohio St.3d 20, 20 OBR 137, 485 N.E.2d 248 (rehearing denied on October 23, 1985; rehearing granted, case allowed, and case reversed by a vote of five to one on October 30, 1985).

In *OAMCO v. Lindley* (1987), 29 Ohio St.3d 1, 29 OBR 122, 503 N.E.2d 1388, this court, without dissent, took action on a motion for rehearing after a first motion for rehearing had been ruled upon. In that case, we said:

"On November 26, 1987, this court, on rehearing, decided the within cause. Appellee has now filed an additional motion for rehearing contending that the scope and effect of our ruling with regard to the prospective application of the decision is unclear and thereby presents the Tax Commissioner with difficulty in implementing our ruling uniformly and fairly.

"Finding several of the points made by the commissioner to be well-taken, the court treats appellee's motion for rehearing as a motion for clarification and [1989 SERB 4-28] grants the motion." *Id.* at 2, 29 OBR at 122, 503 N.E.2d at 1389. See *OAMCO v. Lindley* (1986), 27 Ohio St.3d 7, 27 OBR 427, 500 N.E.2d 1379.

Further, in *Newsome v. Newsome* (case No. 85-819), a rehearing was denied on August 30, 1985. A motion to "amend" the motion for rehearing was made on August 30, 1985. The author of one of today's dissents saw no problem in voting to grant a motion to "amend.".

Vlock v. Stowe-Woodward Co., 34 Ohio St.3d 602,

517 N.E.2d 544 represents yet another instance in which we (by allowing certiorari under a different case number) in effect reconsidered a case after denial of a motion for rehearing (see case Nos. 86-729, 86-2048, 87-220).

The fact is that no precedent governs the procedural matter which is before us. One dissent cites no case which holds that the action taken here is unlawful or improper. (FN2) There is ***604** nothing unlawful in the grant of a motion which is pending before us, where the grant expresses the will of a majority of the justices sworn to office on this court.

A final point is to be made, which perhaps best identifies the animus which informs one dissent in the present case. A change in the court took place between the decision on December 22, 1988 and the motion for reconsideration filed on January 3, 1989. Recognizing this change, one dissent states: "The decision of the majority here is very disturbing to me in that it unlawfully overturns a determination upon major issues made by the majority of the court as constituted last term. More specifically, this later pronouncement of the court will undoubtedly lead to a position significantly at odds with the stance of one member of the prior majority who is no longer present to articulate his position." The dissenter, if disturbed by such a prospect, should not [535 N.D.2d 659] ignore the history of 1986-1987. Examination of the rehearing docket for early 1987 reveals that on fifteen occasions members of the new court voted to rehear determinations "lawfully' made by the previous court in 1986. (FN3) In 1987 the justices who dissent ***605** today did not approve of earlier court determinations and set about to overturn them in (when compared to this year's transition) a somewhat wholesale

fashion. (FN4) Precedent (whether in substantive or procedural matters) is not [1989 SERB 4-29] a rationalization to be turned on and off to suit the whim of the beholder.

MOYER, Chief Justice, dissenting.

I concur in the thrust of the dissent of Justice Holmes; however, I believe the reference to "*stare decisis*" is premature, as no decision of the court changing the opinion in the case has been voted or announced.

It is also appropriate to set forth several significant facts that distinguish from this case the votes for rehearing in the cases referred to in footnote 3 of Justice Brown's concurrence in which rehearings of merit decisions were granted:

[535 N.E.2d 660] 1. In none of those cases was the motion before the court a motion to reconsider the denial of a motion to rehear a merit decision. All motions filed in those cases were motions to rehear a decision of the court on the merits, and were filed pursuant to Section 1, Rule IX of the Rules of Practice of the Supreme Court of Ohio.

2. The votes of "Moyer, C.J." to rehear those cases that had been decided just prior to his becoming a member of this court were based upon the extraordinary and unprecedented circumstances under which those cases were selected for oral argument, in violation of Section 1, Rule VII of the Rules of Practice of the Supreme Court of Ohio: were decided and announced during the last two months of the court session in 1986; and were the source of opinions of such low quality that in at least one of the cases two opposing parties requested a reconsideration or clarification of the court's opinion.

3. Although voting that rehearings should be granted in the cases cited by Justice Brown, "Moyer, C.J." did not participate in the rehearing of the merits in any of those cases.

Finally, perhaps the most important conclusion to be drawn from the most recent vote in this case and all that has been written about that vote is that we should adopt a judicious and rational written procedure for the disposition of motions that are filed under the circumstances of the motion filed herein and those referred to in Justice Brown's concurrence.

WRIGHT, J., concurs in the foregoing dissenting opinion.

HOLMES, Justice, dissenting.

I strongly ***606** dissent from the unprecedented and unlawfully determined decision of the majority.

The motion upon which the majority purports to base its determination has no legal basis in the rules of court, either for this court, any appellate court below, or the federal courts and moreover, is clearly prohibited by the limitations upon post-decision motions contained in the Rules of Practice of the Supreme Court. As such, the action today constitutes the unlawful reviving of a finalized determination of this court, which should be barred by the doctrine of *res judicata*.

The motion filed by appellee Local 695 with this court on January 3, 1989 was entitled a "Motion for Reconsideration of the Denial of Motion for Rehearing." This, of course, was preceded by a decision in this case announced on November 2, 1988, motions for rehearing

and/or clarification filed on November 14, 1988, a continuance and finally an order from this court issued December 22, 1988, which clarified the previous decision but flatly denied a rehearing on the merits. Incidentally, by no stretch of the imagination could our clarification *of* the merits be considered an action *on* the merits. This finalized the case at that time, leaving no other legal basis for challenging this court's determination. The denial of a rehearing was then, under the doctrine of *res judicata*, binding upon all the parties to the action as to all the issues which were or could have been raised therein.

As to the purported jurisdictional basis for the above "motive for reconsideration," there clearly is none, which fact was recognized by both the movant itself and all of the *amici curiae* in support. In the original motions for a rehearing of this court's decision, the movants expressly set forth their then claimed basis for jurisdiction as being "pursuant to Rule IX, [Section 1] of the Rules of Practice" of the Supreme Court of Ohio. This was entirely proper. The movant and the *amici* in support in the second motion have failed to set forth any basis for this court to exercise jurisdiction. Nor could they do so because there is no rule of this court which would permit such a "Motion for Reconsideration of the Denial of a Motion for Rehearing."

As a procedural matter, the sole rule of practice which controls the filing of post-decision motions i the above-cited Rule IX of our Rules of Practice. By its terms, post-decisional practice is limited to a single motion, after which the rule indicates that the case is officially ended. Section 1 of [535 N.E.2d 661] Rule IX states: "A motion for rehearing shall be filed within ten days *after the announcement of the decision*. Such motion must be confined strictly to the

grounds urged for rehearing and must not *constitute a reargument of the case*. * * *" (Emphasis added.)

Clearly this rule provides for "a" single motion for rehearing, as the language utilized is in the singular. No provision is made elsewhere for any other motion after this one is either granted or denied. Further, "the" motion filed is strictly defined as one for a rehearing of "the decision" in the case. This is made obvious by the warning that the motion cannot be a "reargument of the case," which, incidentally, all the motions for rehearing and for reconsideration in the instant case plainly ignored. Thus, the timing of the motion contemplated by the rule is clarified as immediately following the initial decision of this court, which decision evaluated the original substantive claims and arguments presented to us in the briefs and oral argument. The rule cannot be stretched to include reconsiderations of denials of motions for rehearing since it only provides ***607** for a "rehearing," which means the original oral hearing on the merits, and not a "reconsideration" of whatever imaginative pleading was last filed. Otherwise, we would be faced with the anomaly that cases could be kept alive in this court by interminable [1989 SERB 4-30] pleadings, with finality of actions being a sham and a potential doubling of our motion caseload. More importantly, from the standpoint of stability of the law, we could have reversals of the decisional law of this court following the election of a new judge or judges.

That this rule requires a finality of the decision in this and every other case following the denial of a motion for rehearing is made perfectly manifest by Section 2 of rule IX, which states:

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> "Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a *mandate* in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the *mandate* shall issue at the same time as the decision on the motion for rehearing. ***" (Emphasis added.)

The mandate of this court is its final command in the case, issued to the courts below, directing them to act in compliance with the decision and entry of this court. It is the principal means by which the determinations of this court are effectuated. By issuing our mandate, we finalize our decision and the case is then completed. Once final, our decision, as previously mentioned, becomes *res judicata* to the parties.

Furthermore, others have attempted to do what the movant has accomplished herein, *i.e.*, attempted to maintain an action before this court beyond the denial of a motion for rehearing. They have similarly utilized the very pleading form, or ones similar thereto, which the movant now displays, essentially framing such as motions to reconsider our denial of a motion to rehear our decision on the merits. See, *e.g.*, *State v. Hill* (No. 87-313); *State v. Ray* (1988), 37 Ohio St.3d 718, 532 N.E.2d 769; *Kondrat v. Byron* (No. 87-1419); *Joseph v. Dever* (No. 86-1688); *Viock v. Stowe-Woodward Co.*, 34 Ohio St.3d 602, 517 N.E.2d 544; *Akron v. Bilder* (1988), 39 Ohio St.3d 726, 534 N.E.2d 359, and (1988), 40 Ohio St.3d 711, 534 N.E.2d 851; *Senediak v. Senediak* (1988), 39 Ohio St.3d 722, 534 N.E.2d 358, and (1988), 39 Ohio St.3d 731, 534 N.E.2d 359; *LPI of Ohio, Inc. v. Colbert* (1988), 39 Ohio St.3d 722, 534 N.E.2d 358,

and (1988), 40 Ohio St.3d 707, 534 N.E.2d 851; *Upper Ohio Valley Presby. v. Covenant Presby. Church* (No. 88-1647), (1988), 40 Ohio St.3d 711, 534 N.E.2d 852, and (1989), 41 Ohio St.3d 709, 534 N.E.2d 1213.

In no prior case has this court ever allowed such a motion. Prior judicial administrations have gone so far as to strike them. We have, of course, allowed the filing of such motions in these cases. This we have done, not because the majority of this court viewed them as anything beyond the legal nullity that they are, but for reasons of administrative convenience. A case has always been considered and declared final upon the denial of the motion for rehearing and issuance of our mandate.

[535 N.E.2d 662] Although the initial motion for reconsideration was timely filed and, of course, denied by this court as it was constituted last term, the second motion was filed on January 3, 1989, well beyond the ten days allotted by our rules from the original decision in the case. Further, that the movant waited until January 3, 1989 to file its addendum ***608** motion would indicate its desire to avoid another ruling by this court as it was constituted prior thereto and to obtain a judgment from this court as newly constituted. Such action reveals a forum-shopping motivation of the worst sort and is a practice which this court, in its entirety, should unequivocally denounce.

Also, even supposing this second motion for reconsideration of our prior denial were to be considered valid, the decision of the majority goes well beyond that which was sought by appellee, Local Union 695, in its motion. The motion specifically sought only the clarification by this court of three points which the movant felt were initially unanswered by the court in its opinion on the merits

or the explanatory opinion in response to the first motion for reconsideration. These were as follows:

"1. Without the right to binding arbitration do municipal safety forces have the right to strike?

"2. Whether the decision applies to charter and non-charter municipalities, and whether the municipality must adopt an ordinance or law in conflict with R.C. 4117.41(I) in order to be exempt from the provisions of the statute?

"3. Does the unlawful delegation issue extend to all political subdivisions and not just municipalities? Can the State of Ohio through its own legislature delegate to a third person the authority to mandate the wages of its own employees as well as those of townships and counties?"

Rather than limiting its determination here to that which had been specifically requested by the union, the majority has gone far afield and granted not only the basic motion, but will entirely re-decide the case. Such a result has never before been experienced by this court during my tenure.

The decision of the majority here is very disturbing to me in that it unlawfully overturns a determination upon major issues made by the majority of the court as constituted last term. More specifically, this later pronouncement of the court will undoubtedly lead to a position significantly at odds with the stance of one member of the prior majority who is no longer present to articulate his position.

Lastly, the determination of the majority to rehear and redetermine this matter is completely at odds with the long-standing principle of *stare decisis* which, in the main, permits determinations of this court to remain intact unless valid new and changed public policy considerations are later presented to the court for its review. No new public policy

considerations were presented here for the majority's determination to provide a new hearing and determination upon this matter.

It has been suggested by some that the court has acted upon such motions as those now before us in prior cases. One particular example which, upon a surface reading might tend to so suggest, is the case of *Joseph v. Dever* (No. 86-1688). In that case, this court [1989 SERB 4-31] entered its initial decision on December 5, 1986, and denied the motion for reconsideration on December 31, 1986. Thereafter, with two new members on this court, we gave consideration to two later motions filed in this court, under various styles, which were clearly attempts to keep the case alive for consideration by the new panel.

Joseph v. Dever is most inapposite to the situation of the case here for three specific reasons. First, the *Dever* case presented us initially with a motion to certify the record wherein appellant Dever sought to have his case heard upon the merits before this court. In no fashion could Rule IX of ***609** our Rules of Practice apply since that rule, by its express terms, applies to rehearings of merit decisions only. Since there was no hearing on the merits, a motion for rehearing was an impossibility. There being no other rules which would limit the filing of successive motions to reconsider, as there are with the motion for [535 N.E.2d 663] rehearing, Dever did not err in so pursuing the matter.

Perhaps more crucially, Dever sought reconsideration for an excellent reason, for our vote on his first motion to reconsider was three-to-three, one member not participating, and thus most inconclusive. Finding nothing specific in the rules, Dever sought clarification of this vote. In this he was unsuccessful, for on two successive occasions this court

entertained additional motions which made the same request. Our vote in each instance was three-to-two, with two justices not participating.

By way of explaining the implications of such vote, one must begin with Section 2(A), Article IV of the Ohio Constitution which states: "A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment." From this provision we have consistently applied our "rule of four," by which a minimum of four votes is needed for the court to act. The situation of deadlock will, therefore, remain when the Chief Justice, acting within his constitutional discretion, determines not to appoint replacements for those not participating. This is entirely reasonable and advances judicial economy when the court considers a number of purely procedural matters, including motions before the court. As to the impact of the vote, obviously a three-to-three vote is insufficient, under our rule of four, to grant a motion to certify the record; it is also insufficient to deny such motion. Consequently, Dever was fully correct in requesting a review of each vote where there were only three votes in a particular direction. Moreover, in Dever's reply brief of January 15, 1987, there were hints of possibly irregular proceedings. For all these reasons, and more, our proceedings in *Joseph v. Dever* lend no support whatsoever to the majority's unprecedented action in the instant case.

As to the concurring opinion, it should be noted that seldom have concurring opinions of this court been crafted entirely with reference to a dissenting opinion. Rather than set forth its own view of the proceedings, such opinion expends its energy against the bulwark of the law as described above.

Initially, the concurring opinion states that the clarification issued by this court was its "*final* decision in this case." Clearly, it was *not*, as is demonstrated by the fact that *no new mandate* issued from this court upon the clarification. As previously mentioned, a mandate issues for all decisions wherein the merits of a case are determined. A "clarification" order is not a "determination" of any matter affecting the parties and has no relationship to the finality of the decision in the case.

Also, the concurring opinion erroneously asserts the unsupported statement that: "A denial of a motion to certify *adjudicates the dispute* between the parties *every bit as much as a decision by this court on the merits*." (Emphasis added.) Great reliance for the fabric of the concurrence is derived from this obvious misstatement of the law. It has always been the law of Ohio that: " * * * [T]he refusal of a motion to certify, even if the same legal question is decisively involved, *does not furnish an adjudication of the question* by this court as an established precedent. ***610** for future cases." (Emphasis added.) *Brewster v. Hill* (1934), 128 Ohio St.343, 353, 190 N.E. 766, 770. See, also, *Keesecker v. G.M. McKelvey Co.* (1943), 141 Ohio St. 162, 25 O.O. 266, 47 N.E.2d 211, at paragraph three of the syllabus, which is directly on point. Moreover, this is a nearly universal rule and is applied with equal force by the Supreme Court of the United States. *United States v. Carver* (1923), 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361. The Rules of Practice make no provision for rehearings of such denials precisely because they are not adjudications upon the merits.

Furthermore, the concurrence hurriedly asserts that "[s]uch motions fall under Section 1, Rule IX, and must be filed within ten days of the decision," citing as authority 23

Ohio Jurisprudence 3d (198), Courts and Judges, Section 426, as interpreting the rule in the asserted fashion. it, of course, candidly admits that "there is a dearth of case authority on the point." The statements [535 N.E.2d 664] relied upon in Ohio Jurisprudence 3d is that "The Supreme Court Rules of Practice provide that a motion for rehearing *of any cause or motion* shall be made within 10 days after the announcement of the decision." (Emphasis added.) It then ascribes this statement to the rule at issue, which, even a cursory glance would demonstrate, has *no* such language. In fact, what the concurrence relies upon is *not* an interpretation of the present rule but is, in fact, a precise quotation of the rule as it formerly existed (see 167 Ohio St., at 1xxiv-1xxv) until its repeal in 1964. See 176 Ohio St., at x1viii. Thus, while we do not address time limitations upon motions to reconsider decisions on motions to certify, our point was made that no rule now exists in such situations.

The concurrence then refers to a panorama of cases in which it alleges that the very act of the majority was done in prior cases. Such cases are obviously inapposite, as *Wisniewski v. Wisniewski* (1985), 20 Ohio St.3d 20, 20 OBR 137, 485 N.E.2d 248, exemplifies. For that case involved not a hearing upon the merits, but the denial on September 11, [1989 SERB 4-32] 1985 of a motion to certify the record. There was no motion for "rehearing" but a motion for reconsideration. The eventual grant of such motion, after this court's decision in *Shearer v. Shearer* (1985), 18 Ohio St.3d 94, 18 OBR 129, 480 N.E.2d 388, was foundational authority for the proceedings in *Joseph v. Dever*
(No. 86-1688) and this because no rule yet limits such.

OAMCO v. Lindley (1986), 24 Ohio St.3d 124, 24 OBR 347, 493 N.E.2d 1345 ("*OAMCO I*"), *OAMCO v.*

Lindley (1986), 27 Ohio St.3d 7, 27 OBR 427, 500 N.E.2d 1379 ("*OAMCO II*"), and *OAMCO v. Lindley* (1987), 29 Ohio St.3d 1, 29 OBR 122, 503 N.E.2d 1388 ("*OAMCO III*"), are completely useless to the inquiry before us. These were three separate opinions, *OAMCO II* and *OAMCO III* coming before this court upon timely motions to rehear, based upon Section 1, Rule IX, *OAMCO I* was reheard in *OAMCO II* and a mandate issued upon its release. The final clarification was also upon a timely motion to rehear the second hearing on the merits. The remainder of the cases cited are similar in character. In footnote 3, a rather unnecessary list of cases is included. These were all rehearings granted upon the ordinary and timely filings of motions to rehear. As such, they are irrelevant.

by reaching out beyond our recognized procedures, the majority has obviously decided to rehear a case which was final and determined.

I therefore strongly dissent from the decision of the majority herein.

FN1. Though there is a dearth of case authority on the point, Ohio Jurisprudence interprets the rule in this fashion and not as espoused by the dissent. 23 Ohio Jurisprudence 3d (1980) 38, Courts and Judges, Section 426.

FN2. That we have denied a number of motions for reconsideration, including several motions for second reconsideration as enumerated in the dissent, is not precedent for an assertion that such motions must be denied. In fact we voted upon (and thus considered) every one of the enumerated determinations. That is the sole precedential value of those determinations. To argue that denial of a motion in an

unrelated case is precedent for denial of the motion here is as illogical as to argue that by denying fifteen straight jurisdictional motions, we somehow set a precedent that all jurisdictional motions are to be denied.

FN3. Case No. 85-865, *In re Estate of James F. White, Sr. et al. v. Ohio Department of Taxation*, 25 Ohio St.3d 355, 496 N.E.2d 888, rehearing denied, Holmes, Douglas and Wright JJ., voting for a rehearing. In this case the ten-day filing limitation on motions for reconsideration was ignored.

Case No. 85-1808, *Rita S. Fuchsman, Admx. Estate of Roy W. Whisler v. Dallas & Mavis Fwd. Co.*, 28 Ohio St.3d 12, 501 N.E.2d 1197, rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

Case No. 86-229, *Transamerica Insurance Co. et al. v. Charles Richard Taylor, Sr. et al.*, 28 Ohio St.3d 312, 504 N.E.2d 15, rehearing granted, Moyer, C.J., Sweeney, Holmes, Douglas and Wright, JJ., voting for a rehearing.

Case No. 85-1768, *Ohio State Racing Commission v. Racing Guild of Ohio et al.*, 28 Ohio St.3d 317, 28 OBR 386, 503 N.E.2d 1025, rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

Case No. 86-152, *Nilas, Inc. v. Elvira Kern et al.*, rehearing granted, Moyer, C.J., Holmes, Douglas and Wright, JJ., voting for a rehearing. The original Supreme Court decision was subsequently reversed on the merits. See (1986). 28 Ohio St.3d 165, 28 OBR ***610** 257, 502 N.E.2d 1025, and (1987), 31 Ohio St.3d 163, 31 OBR 366, 509 N.E.2d 1267.

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Case No. 86-1688, *Ronald G. Joseph et al. v. Michael L. Dever et al.*, rehearing denied, Moyer, C.J., Holmes and Douglas, JJ., voting for a rehearing.

Case Nos. 86-525, 86-270, *Office of Consumers' Counsel v. Public Utilities Commission of Ohio*, rehearing allowed, Moyer, C.J., Holmes, Douglas and Wright, JJ., voting for a rehearing. The original Supreme Court decisions were subsequently reversed (case No. 86-525), and reversed in part (case No. 86-270) on the merits. See (1987), 32 Ohio St.3d 263, 513 N.E.2d 243.

Case No. 86-784, *New Energy Company of Indiana v. Joanne Limbach, Tax Commissioner, et al.*, rehearing granted, Moyer, C.J., Holmes, Douglas and Wright, JJ., voting for a rehearing. The original Supreme Court decision was subsequently reversed on the merits. See (1987), 32 Ohio St.3d 206, 513 N.E.2d 258. Interestingly, this case went on to the United States Supreme Court which found by a vote of nine to zero that the original Ohio Supreme Court decision was the correct one. See (1988), 486 U.S. 269, 108 S.Ct. 1803, 100 L.Ed.2d 302.

Case No. 86-205, *Ed Stinn Chevrolet, Inc. v. National City Bank*, rehearing allowed, Moyer, C.J., Sweeney, Holmes, Douglas and Wright, JJ., voting for a rehearing. See (1986), 28 Ohio St.3d 221, 28 OBR 305, 503 N.E.2d 524, and (1987), 31 Ohio St.3d 150, 31 OBR 316, 509 N.E.2d 945.

Case No. 85-788, *Barbara Stubbs v. W. Donald Webb, M.D., et al.*, 28 Ohio St.3d 300, 503 N.E.2d 745, rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

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Case No. 85-838, *Carolyn A. Byrne, a Minor, et al. v. Pediatric Assoc., Inc. et al.*, 28 Ohio St.3d 300, 503 N.E.2d 740, rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

Case No. 85-1039, *Deanna R. Wainstein v. University Hospital of Cleveland et al.*, 28 Ohio St.3d 270, 503 N.E.2d 717, rehearing, denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

Case No. 85-1249, *Trena D. Longshore v. Rodney B. Hurl, M.D., et al.*, 28 Ohio St.3d 305, 503 N.E.2d 697 rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

Case No. 85-1461, *Richard Scott Boles et al. v. Dr. Victor George Lenzo et al.*, 28 Ohio St.3d 308, 503 N.E.2d 743, rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

***610_** FN4. I make no assertion that any of the votes in those cases was unlawful or improper. I allude to them only to illustrate the inconsistency in the position which lies at the heart of one of the dissents.

APPENDIX T

Drs. Markowitz, Rozenberg & Associates, Inc.

Stuart L. Markowitz, MD
David M. Rosenberg, MD
Eric J.B. Shapiro, MD
Carl E. Orringer, MD
Richard L. Stein, MD
Paula J. Dauley, MD
Janice A. Granieri, MD

UniversityHospitals Health System Primary Care Phsyician Practices

September 11, 1997

Mr. Patrick J. Perotti
c/o Dworken & Bernstein Company, L.P.A.
153 East Erie Street
Third Floor
Painesville, OH 44077

RE: JAMES KULCH

Dear Mr. Perotti:

I had the opportunity to review the records that you sent me regarding the case of Mr. James Kulch. I have reviewed the discharge summary from his hospitalization at Geauga Hospital on 8/18/90, at which time he was admitted with chest pains and was found to have an acute inferior wall myocardial infarction. Coronary angiography at that time demonstrated total occlusion of the right coronary artery with 40% stenosis in the left anterior descending and in the left

circumflex system. He was treated medically at that time.

I then received the records from his admission to Lutheran Medical Center in late December of 1991 when he was admitted with chest pain and suffered an anterior myocardial infarction. Cardiac catheterization at that time demonstrated progression in his preexisting disease, as the left anterior descending artery was now noted to be 99% narrowed proximal to the first septal perforator and first diagonal branch and there was an 85-90% stenosis in a hug marginal branch of a nondominant left circumflex. The patient was then referred to Dr. Santoscoy at Meridia Huron Hospital for coronary bypass surgery.

After reviewing the information that you sent to me regarding the extremely high level of job related stress that Mr. Kulch was under between September of 1990 to the time of his termination from employment on October 17, 1991, it is my opinion that the job activities, firing and financial fear and stress, superimposed upon his preexisting heart condition, was more likely than not a causal factor in the patient's subsequent myocardial infarction in December of 1991.

Sincerely yours,

/s/_____
Carl E. Orringer, M.D.

CEO/taa